No. 95-789

# In the Supreme Court of the United States

OCTOBER TERM, 1995

CALIFORNIA DIVISION OF LABOR STANDARDS ENFORCEMENT, ET AL., PETITIONERS

*v.*

DILLINGHAM CONSTRUCTION, N.A., INC., ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Whether the Employee Retirement Income Security Act (ERISA) preempts a state law that requires contractors on state public works projects to pay prevailing journeyman wage rates to employees in apprenticeship programs that have not received state approval, but allows lower apprenticeship rates to be paid to employees in state-approved programs.

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### INTEREST OF THE UNITED STATES

This case presents questions concerning the scope of the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144, and its relationship to the National Apprenticeship Act (Fitzgerald Act), 29 U.S.C. 50. The Secretary of Labor is primarily responsible for administering and enforcing Title I of ERISA, see 29 U.S.C. 1002(13), 1136(b), and for formulating and promoting sound labor standards for apprentices and cooperating with state agencies under the Fitzgerald Act, 29 U.S.C. 50. The United States therefore has a substantial interest in the resolution of the question presented.

### STATEMENT

1. In 1987, respondent Dillingham Construction Company was awarded a contract to build a detention facility

for Sonoma County, California. Pet. App. 25. When work began, a subcontractor, respondent Sound Systems Media, was subject to a collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW) Local 202 that included certain apprentice wage rates that were lower than the applicable journeyman rates. The agreement also required payments to a state-approved joint apprenticeship training committee (JATC). *Id.* at 25-26.[1] In May 1988, after a few months of work, IBEW Local 202 withdrew its representation of Sound Systems' employees. *Id.* at 26.

In June 1988, Sound Systems entered a new collective bargaining agreement with the National Electronic Systems Technicians Union (NESTU). The agreement once again included a scale of apprentice wages and required Sound Systems to contribute to the JATC associated with the new union—the Electronic and Communications Systems Joint Apprenticeship and Training Trust (E & C JATC). Pet. App. 26. Sound Systems thus began relying on the E & C JATC for apprentices and paid them in accordance with the agreed-upon apprentice wage scale. *Ibid.* There is no evidence that Sound Systems provided any training for those apprentices. *Id.* at 28 n.3.

2. This case arises because Sound Systems' payment of apprentice wages to individuals hired from the E & C JATC program violated provisions of California's prevailing wage statute. Under that law, which is modeled on the federal Davis-Bacon Act, 40 U.S.C. 276a(b), "[c]ontractors who are awarded public works projects agree to pay prevailing wages to all their construction employees

[1] An apprenticeship training committee consists of persons designated by the sponsor of an apprenticeship program to administer the program. 29 C.F.R. 29.2(i). Such committees may be either joint (with equal numbers of employer and employee representatives) or unilateral (sponsored by a management group or an individual employer or by a labor organization). *Ibid.*; Cal. Labor Code § 3075 (West 1989). JATCs "are the source of the apprentices and provide for their training." Pet. App. 5, 26.



at the journeyman level in specified trades." Pet. App. 3; see Cal. Labor Code §§ 1771, 1773, 1774 (West 1989). However, "[p]ublic works contractors that employ apprentices can pay them an amount lower than the prevailing journeyman wage so long as those apprentices are part of an approved apprenticeship program." Pet. App. 3-4; see Cal. Labor Code § 1777.5 (West 1989 & Supp. 1995) (permitting contractors to employ "properly registered apprentices upon public works," but requiring that they be "in training under apprenticeship standards and written apprentice agreements under" California statutes regarding apprenticeship programs). Contrary to those provisions, the E & C JATC did not apply for state approval for its apprenticeship training program until August 1989, and it did not receive such approval until October 1990. Pet. App. 27. Thus, throughout the period from June 1988 until October 1990, Sound Systems was paying less-than-journeyman wages to individuals who were not participants in a state-approved apprenticeship program.

The substantive standards and mechanisms employed by California in approving apprenticeship programs are closely related to federal standards for such programs under the National Apprenticeship Act, 29 U.S.C. 50 *et seq.*, popularly known as the Fitzgerald Act. See p. 27 n.9, *infra*. Since its enactment in 1937, the Fitzgerald Act has "authorized and directed" the Secretary of Labor

> to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship * * * [and] to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship.

29 U.S.C. 50; see Act of Aug. 16, 1937, ch. 663, 50 Stat. 664.

Pursuant to the Fitzgerald Act, the Secretary has issued regulations "to set forth labor standards to safeguard the welfare of apprentices." 29 C.F.R. 29.1(b). Under those standards, an apprenticeship program must be based on "an organized, written plan embodying the terms and conditions of employment, training and supervision" of apprentices. 29 C.F.R. 29.5(a). Apprentices must be "employed to learn a skilled trade," 29 C.F.R. 29.2(e), which requires, *inter alia*, "a minimum of 2,000 hours of on-the-job work experience" and "related instruction to supplement the on-the-job training." 29 C.F.R. 29.4(c), (d); see also 29 C.F.R. 29.5(b)(2), (4). Apprenticeship programs must satisfy equal opportunity requirements, 29 C.F.R. 29.5(b), and their training programs must be given "in a classroom through trade or industrial courses" or other forms of approved study, 29 C.F.R. 29.5(b)(4). The regulations also require, *inter alia*, that apprentices be paid "[a] progressively increasing schedule of wages," that "[t]he numeric ratio of apprentices to journeymen" be "consistent with proper supervision, training, safety, and continuity of employment," and that the program provide "[a]dequate and safe equipment and facilities for training and supervision," 29 C.F.R. 29.5(b)(5), (7), (9).

The regulations do not impose requirements on all apprenticeship programs. However, the regulations do provide that "[e]ligibility for various federal purposes is conditioned upon a program's conformity with" the regulatory standards and proper registration of the program. 29 C.F.R. 29.3(a). Those "federal purposes" include "any federal contract, grant, agreement or arrangement dealing with apprenticeship, and any Federal financial or other assistance * * * pertaining to apprenticeship." 29 C.F.R. 29.2(k). For example, federal contractors may pay apprentices less than the prevailing rate for journeymen under federal statutes such as the Service Contract Act or the Davis-Bacon Act only if the apprentices come from approved apprenticeship programs. *See* 29 C.F.R.



4.6(p), 5.5(a)(4)(i). The regulations thus provide an incentive for employers to see to it that their apprentices are enrolled in programs that satisfy federal standards and are properly registered.

Pursuant to the Fitzgerald Act's directive to the Secretary to "cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship," 29 U.S.C. 50, the Act's apprenticeship standards are administered through a cooperative federal-state arrangement. An employer may seek approval for and register an apprenticeship program for federal purposes either with a federally recognized state apprenticeship agency or council (SAC), to which the power to grant Fitzgerald Act approval is delegated, or with the Department of Labor's Bureau of Apprenticeship and Training (BAT) if no such agency is recognized in the employer's state. See 29 C.F.R. 29.3(a), 29.12(a), 29.12(e)(2). California has such a federally approved apprenticeship council, within petitioner Division of Apprenticeship Standards. Pet. App. 2-3; J.A. (Jesswein Aff. ¶ 3). Indeed, under the decision of the California Supreme Court in *Southern California Chapter of Associated Builders and Contractors, Inc.* v. *California Apprenticeship Council*, 841 P.2d 1011 (1992), even when the State is approving apprenticeship programs for its own purposes, it may not apply standards for approval that are different from those in the Fitzgerald Act regulations.

3. In 1989, the State began to investigate charges that Sound Systems was paying lower-than-journeyman wages to apprentices from the E & C JATC, even though that program had not received state approval and its apprentices were unregistered. After an investigation, the State issued a notice of noncompliance to Dillingham and directed the County of Sonoma to withhold monies from Dillingham based on the failure of its subcontractor—Sound Systems—to comply with the State's prevailing wage law. The amount of money withheld equaled the difference between the apprenticeship wages paid to the

unregistered E & C JATC apprentices and the journeyman rates that should have been paid, plus applicable penalties. Pet. App. 27. See Cal. Labor Code § 1775 (West 1989 & Supp. 1996).

4. Dillingham and Sound Systems commenced this declaratory judgment action in federal court, arguing, *inter alia*, that ERISA preempts the state enforcement action.[2] The district court granted summary judgment for the State. Pet. App. 24-26.

First, the district court concluded that Sound Systems' apprenticeship program was an ERISA plan. Pet. App. 32-33. The court noted that ERISA defines "employee welfare benefit plan" to include apprenticeship and training programs established by an employer, employee organization, or both, and the court reasoned that Sound Systems purported to establish such a program. *Id.* at 33 (citing 29 U.S.C. 1002(1)). The court also concluded that California's approval scheme for apprenticeship programs "relates to" ERISA plans within the meaning of Section 514(a) of ERISA, 29 U.S.C. 1144(a), which provides that the provisions of ERISA "shall supersede any and all State laws insofar as they * * * relate to any employee benefit plan" covered by the Act. Pet. App. 34-35.

The district court held, however, that California's authority to establish and enforce minimum apprenticeship standards was saved from preemption by Section 514(d) of ERISA, 29 U.S.C. 1144(d). Pet. App. 40. That

[2] Dillingham and Sound Systems also argued that ERISA preempts state attempts to force Sound Systems "to participate in or make contributions to [IBEW's JATC]." First Amended Complaint, ¶ 29. The state disclaimed any attempts to do so, however, see Defendant Division of Apprenticeship Standard's (DAS)'s Responses to Plaintiff's Interrogatories at 1-3, and the district court addressed only Sound Systems' payments to workers. Pet. App. 27-28. Dillingham and Sound Systems also argued that the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, preempted the state enforcement action. The distirct court rejected that argument (Pet. App. 40-50), and the court of appeals did not reach it.



Section provides that "[n]othing in [Title I of ERISA] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States * * * or any rule or regulation issued under such law." In the court's view, "preemption of the state approval requirement would unquestionably impair the purposes of the Fitzgerald Act and its regulations within the meaning of ERISA's savings clause." Pet. App. 39-40. The court also construed the State's approval requirement as "insur[ing] the integrity of apprenticeship programs and protect[ing] the public and would-be apprentices from fraudulent programs which result in inadequately-trained or abandoned apprentices." Pet. App. 39. Therefore, the court concluded, it fell "squarely" within the articulated purpose of the Fitzgerald Act and Department of Labor regulations, which would be impaired if ERISA preempted it. *Ibid.* (citing 29 C.F.R. 29.1).

5. The court of appeals reversed. Pet. App. 1-22. The court agreed with the district court that the program Sound Systems established through the E & C JATC was an ERISA plan. *Id.* at 10-11. Indeed, the court appeared to assume that *all* apprenticeship programs were ERISA plans, stating that "an apprenticeship program established for the purpose of providing apprenticeship training falls within the plain meaning of section 1002(1)'s definition of 'employee welfare benefit plan.'" Pet. App. 11; see also *id.* at 13-14 ("an apprenticeship training program is an employee benefit plan for purposes of ERISA"). The court then reasoned that "the application of a state's prevailing wage law to allow payment of lower apprenticeship wages to employees in approved apprenticeship programs 'has the effect, and possibly the aim,' of encouraging participation in state approved ERISA [apprenticeship] plans." Pet. App. 14 (quoting *National Elevator Industry, Inc.* v. *Calhoon*, 957 F.2d 1555, 1559 (10th Cir.), cert. denied, 506 U.S. 953 (1992)). Because "permitt[ing] [a State] to use a prevailing wage scheme to single out certain ERISA plans

over other ERISA plans" would permit a State "covertly [to] disturb or alter ERISA plans," the court held that "the application of California's prevailing wage law in this case 'relates to' an ERISA plan and thus falls under ERISA's preemption clause." Pet. App. 14-15.

The court of appeals also held that enforcement of the State's prevailing wage law was not saved by Section 514(d) of ERISA. Pet. App. 16-17. In the court's view, preemption of the State's prevailing wage law would not "impair" the Fitzgerald Act or its implementing regulations because "the Fitzgerald Act does not rely on state laws for enforcement and includes no clause 'preserving' nonconflicting state laws." *Id.* at 17. The court recognized that the Secretary of Labor's regulations provide standards for either federal or state approval and recognition of apprenticeship programs for federal purposes. *Ibid.* State approval was nonetheless not a way of enforcing the Fitzgerald Act, the court concluded, because the Fitzgerald Act "merely seeks to facilitate the development of apprenticeship programs—it does not mandate apprenticeship programs or seek to discourage other training programs." *Id.* at 18. In the court's view, "even if the application of the prevailing wage law is in the furtherance of the objectives of the Fitzgerald Act, it is not an enforcement mechanism of federal law, and to the extent that its enforcement in this case is preempted by ERISA, federal law is not impaired." *Ibid.*[3]

## SUMMARY OF ARGUMENT

Proper resolution of the preemption issue in this case turns on the answers to three questions. The first question is whether the entity from which Sound Systems obtained its apprentices is an ERISA plan. If not, ERISA has no preemptive effect in this case. Second, if the

[3] The court of appeals also rejected the State's arguments that Dillingham was estopped from challenging the State's prevailing wage law and that preemption did not apply because the State was acting as a market participant, not as a regulator. Pet. App. 18-21.



apprenticeship program is an ERISA plan, the state law at issue here—the State's rule that public works contractors may pay apprentice wages only to those in state-approved apprenticeship programs—would be "supersede[d]" by ERISA only if it "relate[s] to" that ERISA plan. 29 U.S.C. 1144(a). Finally, even if the state law does "relate to" an ERISA plan, Section 514(d) of ERISA would preserve it if preemption would "impair" the Fitzgerald Act and its implementing regulations. We address each of those questions in turn.

I.A. Section 3(1)(A) of ERISA defines "employee welfare benefit plan" to include any "plan, fund, or program" established by an employer to the extent it provides certain enumerated employee benefits, including "apprenticeship or other training programs." As interpreted by regulations issued by the Secretary of Labor, that definition does not encompass all apprenticeship and training programs. Instead—as illustrated by this Court's decision in *Massachusetts* v. *Morash*, 490 U.S. 107 (1989), with respect to vacation benefits—the basic distinction is between apprenticeship and training programs for which the employer has set aside separate funds (which are ERISA plans) and those supported out of an employer's general assets (which are not ERISA plans). Applying that analysis, we agree with the courts below that the plan from which Sound Systems obtained its apprentices was an ERISA plan, since it was established to provide an apprenticeship training program and since Sound Systems was obligated to make periodic payments to fund it.

I.B. The state law permitting contractors to pay lower wages to apprentices from state-approved programs does not, however, "relate to" an ERISA plan. Although it undoubtedly encourages state contractors to obtain apprentices from state-approved apprenticeship training programs, such programs may be either ERISA plans or non-ERISA programs. Since the State law is entirely neutral with respect to whether the employer chooses to

achieve the offered benefit (the right to pay lower wages on state public works projects) through an ERISA or a non-ERISA plan, the law relates to apprenticeship training in connection with state projects, not to an ERISA plan.

II. Finally, even if the state law could be said to "relate to" an ERISA plan, it would be saved by Section 514(d) of ERISA because preemption of state law in this area would substantially "impair" the federal program for encouraging sound standards for apprenticeship training under the Fitzgerald Act and its implementing regulations. The Act and its regulations envision a federal-state cooperative effort to promote uniform and sound apprenticeship standards, to encourage employers to offer apprenticeship training, and to protect those who enroll in such programs from abusive practices. Such a joint effort would be substantially frustrated if ERISA prohibited the States from promoting the federal-state standards developed under the Fitzgerald Act through laws like the one at issue in this case.

## ARGUMENT

### I. CALIFORNIA'S DECISION TO PERMIT STATE CONTRACTORS TO PAY APPRENTICESHIP WAGES ONLY TO APPRENTICES FROM STATE-APPROVED PROGRAMS IS NOT PREEMPTED BY SECTION 514 OF ERISA

#### A. Not All Apprenticeship Training Programs Are ERISA Plans

Section 514(a) of ERISA supersedes state laws that relate to employee benefit *plans*, but not laws that merely relate to employee *benefits*. *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 7-8 (1987). Accordingly, the initial preemption inquiry is whether the apprenticeship program that respondent Sound Systems purported to establish through the E & C JATC was an ERISA plan. We agree with the lower courts in this case that it was, although in our view the analysis employed by those courts was incomplete. This issue deserves somewhat extended discussion, because it substantially affects the analysis of the "relates to" issue in this case, where in our view the court of appeals erred.



1. Section 3(1)(A) of ERISA defines "employee welfare benefit plan" to include any "plan, fund, or program" established or maintained by an employer, employee organization, or both, to the extent it provides, *inter alia*, "apprenticeship or other training programs" for its participants and beneficiaries. 29 U.S.C. 1002(1)(A). As we explained in our Brief as Amicus Curiae, *Lennes* v. *Boise Cascade Corp.*, No. 91-707, at 7-10, however, that does not mean that all apprenticeship or other training programs are ERISA plans.

First, interpretive regulations promulgated by the Secretary of Labor exclude from ERISA coverage employee benefit plans that provide compensation for on-the-job training. See 29 C.F.R. 2510.3-1(b)(3)(iv) (excluding "[p]ayment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training"). As the Secretary explained in proposing that exclusion, "[a]lthough [29 U.S.C. 1002(1)] of [ERISA] could be read to include job-skill training within the term 'welfare plan,' such training is virtually inseparable from an employee's normal duties for which compensation is paid, and therefore is not treated as an employee benefit plan." 40 Fed. Reg. 24,643 (1975). That regulatory exclusion is just one part of a broader coverage exclusion for a variety of "payroll practices" (such as overtime pay, sick pay, and vacation pay) that amount to nothing more than payment of ordinary compensation out of the employer's general assets. 29 C.F.R. 2510.3-1(b). Indeed, another part of the payroll practices regulations (the exclusion of vacation pay) has been upheld by this Court. *Massachusetts* v. *Morash*, 490 U.S. 107 (1989). Accordingly, in the Secretary of Labor's view, the fact that an employer provides on-the-job training does not mean that such training is provided through an ERISA plan.

Second, the Secretary's regulations exclude various plans that provide for classroom instruction. Specifically, the regulations exclude so-called "[u]nfunded scholarship program[s], under which payments are made solely from the general assets of an employer or employee organization." 29 C.F.R. 2510.3-1(k); see 40 Fed. Reg. 34,527 (1975). The Department of Labor has also issued an advisory opinion stating that an in-house professional development program maintained by an accounting firm to provide continuing education for its licensed accountants, financed by the firm's general assets, is not an employee welfare benefit plan as defined in ERISA. U.S. Dep't of Labor ERISA Advisory Op. No. 83-32A (June 21, 1983); see also U.S. Dep't of Labor ERISA Advisory Op. No. 76-01 (Feb. 21, 1976) (tuition refunds to bank employees paid from the bank's general assets do not constitute a covered plan). Accordingly, in the Secretary's view, unfunded classroom training programs, whether provided directly by an employer or purchased from an educational institution, do not constitute ERISA plans.

If neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan, then an unfunded program—such as an apprenticeship program—providing both types of training is not an ERISA plan either. On the other hand, apprenticeship programs that are separately funded—as are those financed by joint apprenticeship trusts established under 29 U.S.C. 186(c)—are covered by ERISA. The rationale for such a distinction is explained in *Massachusetts* v. *Morash*, 490 U.S. at 112-119. In *Morash*, the Court approved the Secretary's similar determination that only funded—and not unfunded—vacation pay arrangements are covered by ERISA. The Court explained that "[i]n enacting ERISA, Congress' primary concern was with the mismanagement of funds accumulated to finance employee benefits and the failure to pay employees benefits from accumulated funds." *Id.* at 115. The existence of separate rate plan assets makes funded plans susceptible to



the kinds of fiduciary abuses that ERISA was designed to prevent. The Court accordingly upheld the Secretary's payroll practice regulation insofar as it excludes unfunded vacation benefits from coverage.

In reaching that conclusion, the Court also noted that "the extension of ERISA to claims for vacation benefits would vastly expand the jurisdiction of the federal courts, providing a federal forum for any employee with a vacation grievance." 490 U.S. at 118-119. Similarly, if all employer-provided training is covered by ERISA, employees would have the right to bring benefit claims or fiduciary-breach claims in federal court under Section 502(a) of ERISA, 29 U.S.C. 1132(a), each time their employer denied them an opportunity to attend a training course. ERISA was not intended to sweep so broadly; the Secretary quite properly exercised his rulemaking authority under Section 505 of ERISA, 29 U.S.C. 1135, to define the proper scope of the term "employee welfare benefit plan."

As this Court has recognized, the Secretary's coverage regulations are entitled to deference. *Massachusetts* v. *Morash*, 490 U.S. at 115-118. Excluding unfunded apprenticeship programs from ERISA coverage is a permissible interpretation of the statutory language and is fully consistent with Congress's intent. Accordingly, although some (funded) apprenticeship programs are ERISA plans, other (unfunded) apprenticeship programs are not.

2. The plan at issue in this case—the E & C JATC—is an ERISA plan under the above principles. Initially, the E & C JATC fits the statutory definition because it was established or maintained by employers, including Sound Systems, and an employee organization (NESTU), to provide an apprenticeship "program" for participants and beneficiaries of contributing employers and unions. In addition, the E & C JATC qualifies as a plan under the regulations because training under the plan was not provided out of the employer's general assets; Sound Systems was obligated to contribute to the trust, which

in turn financed the training for the apprentices at issue. Pet. App. 26. By establishing the E & C JATC as its apprenticeship program, Sound Systems thereby established a program that was an ERISA plan.[4]

### B. The Application Of California's Prevailing Wage Law To Permit State Contractors To Pay Apprenticeship Wages Only To State-Registered Apprentices In Approved Plans Does Not Relate To An ERISA Plan

Under Section 514(a) of ERISA, 29 U.S.C. 1144(a), ERISA supersedes all state laws that "relate to" an ERISA plan.[5] This Court has explained that "[a] law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983). Thus, a state law may "relate to" an ERISA plan "even if the law is not specifically designed to affect such plans, or the effect is only indirect." *District of Columbia* v. *Greater Washington Bd. of Trade*, 506 U.S. 125, 130 (1992). On the other hand, "[s]ome state [laws] may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a

[4] The Court need not reach the contention of amicus AFL-CIO that an ERISA apprenticeship program includes only the plan for financially supporting an apprenticeship program, not the set of labor and other standards followed by the program in training apprentices. See AFL-CIO Amicus Br. on Petition for Writ of Certiorari 5-15. Assuming that an ERISA apprenticeship plan includes more than just the mechanism of financial support, we argue below that the California law at issue in this case does not "relate to" ERISA plans and in any event is saved by 29 U.S.C. 1144(d).

[5] Because ERISA broadly defines "State law" to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State," 29 U.S.C. 1144(c)(1), and the State acted here to enforce its prevailing wage statute, the preemption inquiry should not turn on whether the state law concerns the State's actions as a market participant or instead the State's role as regulator of private conduct. See Pet. App. 21.



finding that the law 'relates to'" ERISA plans, *Shaw*, 463 U.S. at 100 n.21, "as is the case with many laws of general applicability." *Greater Washington Bd. of Trade*, 506 U.S. at 130 n.1. In this context, a generally applicable statute that "makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan" cannot be said to relate to it. *Ingersoll-Rand* v. *McClendon*, 498 U.S. 133, 139 (1990). Finally, especially where preemption would oust the States of long-standing authority to regulate an area of traditional state concern and regulation (here, employee training and wages and the terms of state contracts), the analysis must "look * * * to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *New York Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 115 S. Ct. 1671, 1677 (1995).

1. Applying the above principles, the rule at issue here does not relate to an ERISA plan. As applied in this case, the California law permits state contractors to pay lower wages to apprentices enrolled in registered apprenticeship programs than they can pay to other employees, including those enrolled in non-registered apprenticeship programs. The law therefore undoubtedly encourages state contractors to provide training for their employees through apprenticeship programs that satisfy the State's substantive standards, and it discourages contractors from providing training through programs that fail to satisfy those standards or that fail to seek state registration.

We may assume that if, as the court of appeals believed, all apprenticeship training programs are necessarily ERISA plans, the State's law would likely relate to such plans. In that event, it could even be argued that the State's law has a "reference to" ERISA plans, *Shaw*, 463 U.S. at 97, since the very subject of the State's law would be a category composed entirely and necessarily of ERISA plans. Although the State's scheme would not directly impose requirements on such plans (since con-

tractors on state projects would remain free not to employ apprentices at all, or to pay all the relevant employees at journeyman's rates), the immediate effect of the scheme would be to encourage certain sorts of ERISA plans and discourage others. That is the sort of direct state interference that ERISA's preemption clause was intended to prohibit.[6] Cf. *Shaw*, 463 U.S. at 97 (holding preempted state law requiring employers to structure their benefit plans to pay pregnancy benefits); *Travelers*, 115 S. Ct. at 1681, 1685 (preemption problems raised by forcing employers to choose particular plans or binding administrators to particular coverage).

As explained above, however, not all apprenticeship programs are ERISA's plans. See pp. 11-13, *supra*. Under the Secretary's regulations, apprenticeship training programs that are paid for out of separate funds set aside for that purpose are ERISA plans, while programs that are paid for out of the employer's general assets are not. Both sorts of apprenticeship programs may receive state approval. The State's approval requirements concern the type of training that must be offered to apprentices, including such matters as the numbers of hours of classroom training that apprentices must receive, the ratio of apprentices to journeymen on the job, and the stages at which apprentice wages must gradually rise to the journeyman level. The requirements therefore do not discriminate

[6] A separate portion of the same prevailing wage law at issue in this case, California Labor Code § 1777.5, appears to require employers on public works projects who employ apprentices either to make contributions to existing funds that "administer and conduct [the] apprenticeship program" or, in the alternative, to make contributions in like amount to the California Apprenticeship Council, a state body. See Pet. App. 62. A provision of that sort could be interpreted to require public works contractors who wish to employ apprentices either to do so through a funded apprenticeship program (*i.e.*, an ERISA plan) or to pay a penalty to the State. If it were interpreted in that way, such a provision would raise substantial preemption issues under ERISA, since it would interfere in the employer's decision about whether to provide apprenticeship training through an ERISA plan or otherwise. That portion of Section 1777.5 is not an issue in this case. See note 2, *supra*.



in favor of or against ERISA plans, since they neither require or prohibit—nor encourage or discourage—apprenticeship programs to be operated as ERISA (*i.e.*, funded) plans or non-ERISA (*i.e.*, unfunded) plans.[7] Accordingly, both ERISA and non-ERISA plans may provide registered apprentices to employers who want them. Although a contractor may pay the lower, apprentice wage scale only to registered apprentices, it is up to the contractor whether to train such apprentices through an ERISA plan or a non-ERISA training program.[8]

Nor does the State's rule that a contractor may pay lower wages only to registered apprentices impose any

[7] Different considerations would be implicated by California's application of its "need" requirement to deny approval of a new program that would adversely affect an existing one. The California Supreme Court, however, held that provision to be preempted by ERISA. *Southern Cal.*, 841 P.2d at 1021-1025. That court concluded "that the only apparent purpose of [this requirement] is to restrict competition among apprenticeship programs." *Id.* at 1029; see also *Associated Gen. Contractors* v. *Smith*, 74 F.3d 926, 930 (9th Cir. 1996) (ERISA preempts State's authority to deny expansion of an apprenticeship program). The State's use of its "need" requirement could defeat the formation of new ERISA apprenticeship programs, and if most existing apprenticeship programs are ERISA plans, the "need" requirement could effectively require employers to use existing ERISA plans as their source of apprentices.

[8] Most state-approved apprenticeship programs in the construction industry in California appear to be ERISA plans. The Department of Labor's BAT reports that between April and June 1994, California had 175 joint and 13 unilateral active apprenticeship programs in the construction industry. Joint programs (JATCs) must be funded to comply with Section 302(c)(6) of the Labor Management Relations Act, 29 U.S.C. 186(c)(6), and they therefore must be ERISA plans. Some of the unilateral plans may also be funded plans. The preemption analysis, however, is not affected by the fact that employers may choose to use funded plans for a variety of reasons—including, in the construction industry, the typically temporary nature of the employment relationship between a particular employer and employee—having nothing to do with the law at issue in this case.

obligation on ERISA plans themselves. Although employers engaged in public works construction may seek to establish or participate in apprenticeship programs that satisfy the State's standards, ERISA apprenticeship programs remain free to offer training that differs from, or is in addition to, that necessary for state approval. In short, the state law in no way "mandate[s] employee benefit structures or their administration." *Travelers*, 115 S. Ct. at 1678. Compare *FMC Corp.* v. *Holliday*, 498 U.S. 52, 60 (1990) (holding preempted Pennsylvania law that prohibited "plans from * * * requiring reimbursement [from the beneficiary] in the event of recovery from a third party"); *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (holding that law requiring plans to include mental health benefits in their policies "clearly 'relate[s] to' welfare plans governed by ERISA"); *Shaw*, 463 U.S. at 97 (holding that law requiring "employers to pay employees specific benefits clearly relate[d] to [ERISA] plans"); *Alessi* v. *Raybestos-Manhattan*, 451 U.S. 504, 524 (1981) (holding preempted New Jersey statute that "eliminate[d] one method for calculating pensions benefits * * * that is permitted by federal law").

3. As we have explained, the California rule at issue here imposes no requirements on ERISA plans. Although it provides an incentive for employers to act in a certain way, it leaves it open for them to do so through ERISA or non-ERISA plans. The analysis in this case is therefore controlled by the analysis in two cases in which this Court has held state laws not preempted—*Shaw* and *Travelers*.

a. One of the features of the state law at issue in *Shaw* was the State's requirement that employers pay certain benefits to employees unable to work because of nonoccupational injuries or illnesses. Under Section 4(b)(3) of ERISA, 29 U.S.C. 1003(b)(3), plans maintained "solely for the purpose of" providing such disability insurance are excluded from coverage as ERISA plans. In *Shaw*, this Court noted that some benefit plans



both pay disability insurance and provide other benefits, and therefore do not come within the exclusion in Section 4(b)(3). 463 U.S. at 108. Nonetheless, the Court held that the State's law was not preempted, employing reasoning directly applicable to this case. The Court explained that "while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." 463 U.S. at 108. Therefore, the Court held, the State could enforce its disability insurance requirements "against those [employers] that provide disability benefits as part of multibenefit plans." *Ibid.*

The same conclusion follows in this case. As in *Shaw*, a State may not require an employer to meet State approval requirements if it wants to set up an ERISA apprenticeship training plan. But *Shaw* makes clear that a State may continue to regulate the substance of apprenticeship—and other—training by private employers, so long as it leaves the employer free to decide whether to provide such training in an ERISA or a non-ERISA program. It follows *a fortiori* that a State may encourage sound apprenticeship practices by encouraging employers on state public works programs to employ apprentices from training programs that satisfy state standards. See also *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988) (holding that ERISA did not preempt the application of a general state garnishment statute to participants' benefits in the hands of an ERISA plan); *Keystone Chapter, Associated Builders & Contractors* v. *Foley*, 37 F.3d 945, 960-961 (3d Cir. 1994) (state may require contractors to include employee benefits in the amount of prevailing wages they pay so long as they have the choice of paying in either benefits or cash), cert. denied, 115 S. Ct. 1393 (1995).

b. This Court's decision in *Travelers* elaborates on a similar point. The Court in *Travelers* recognized that "[i]f 'relate to' were taken to the furthest stretch of its indeterminancy, then for all practical purposes pre-

emption would never run its course." 115 S. Ct. at 1677. The Court therefore noted that it must "look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive." *Ibid.*

In performing that analysis, the Court relied on a number of factors that are also present in this case. The Court noted that, although the hospital-cost regulatory scheme at issue in *Travelers* does affect the cost of health coverage that ERISA plans (and others) purchase, it "does not bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself," since plans retained the choice of what type of health coverage to purchase. 115 S. Ct. at 1679. Similarly, as explained above, the application of California's prevailing wage law does not "bind plan administrators to any particular choice" regarding the operation of an ERISA apprenticeship program.

The Court in *Travelers* also noted that rate variations among hospital providers "are accepted examples of cost variation," 115 S. Ct. at 1679, and are not examples of the "conflicting directives" by States "from which Congress meant to insulate ERISA plans," 115 S. Ct. at 1680. Similarly, prevailing wages in different States—or even in different areas of a single State—may vary substantially, and training requirements for membership in skilled trades may also vary among different trades, different communities, and different States. Unless all wage differentials are abolished and all state-imposed training requirements are held preempted, such variation will necessarily continue. As in *Travelers*, that permissible variation does not implicate the interest in uniformity in plan administration that Congress sought to protect.

In addition, the Court in *Travelers* noted that "nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." 115 S. Ct. at 1680. Similarly, employee



training and qualification for membership in a skilled trade—especially on a public works project—is an area that has traditionally been subject to extensive state regulation. Indeed, ERISA defines ERISA plans to include "apprenticeship *or other training* programs." 29 U.S.C. 1002(1)(A) (emphasis added). If the Ninth Circuit's analysis were correct, it would appear that all state regulation of all employee training programs would be threatened, since employers could simply opt out of state regulation by conducting their training through the mechanism of an ERISA plan. There is no evidence that Congress intended ERISA to supplant state authority throughout the entire sphere of employee training.

Finally, the Court's conclusion in *Travelers* was reinforced by its consideration of the National Health Planning and Resources Development Act of 1974 (NHPRDA), Pub. L. No. 93-641, §§1-3, 88 Stat. 2225, repealed Pub. L. No. 99-660, Title VII, § 701(a), 100 Stat. 3799, the goal of which was in part to assist the States to develop rate methodologies like that claimed to be preempted in *Travelers*. See 115 S. Ct. at 1681-1682. The Court noted that

> the significant point * * * is that the [NHPRDA's] provision for comprehensive aid to state health care rate regulations is simply incompatible with pre-emption of the same by ERISA. To interpret ERISA's pre-emption provision as broadly as respondents suggest would have rendered the entire NHPRDA utterly nugatory, since it would have left States without the authority to do just what Congress was expressly trying to induce them to do by enacting the NHPRDA.

115 S. Ct. at 1682.

The same principle applies to this case. As we show below, the Fitzgerald Act was intended to foster a cooperative federal-state relationship to promote uniform

apprenticeship standards that foster employee training and protect apprentices from abuses. Under the Ninth Circuit's decision, however, the State's ability to regulate apprenticeship training consistent with the Fitzgerald Act and its implementing regulations would be severely curtailed or eliminated. That result "would [leave] States without the authority to do just what Congress was expressly trying to induce them to do by enacting [the Fitzgerald Act]."

## II. CALIFORNIA'S SCHEME IS IN ANY EVENT SAVED BY SECTION 514(d) OF ERISA, BECAUSE PREEMPTION WOULD IMPAIR THE FITZGERALD ACT AND ITS IMPLEMENTING REGULATIONS

This Court recognized in *Shaw* that even if a state law relates to an ERISA plan, Section 514(d) of ERISA will save the state law to the extent that preemption would "modify" or "impair" another federal law. 463 U.S. at 100-102. Even if California's requirement that state public works contractors may pay lower-than-journeyman wages only to registered apprentices were held to "relate to" ERISA plans, preemption of California's law would "impair" the Fitzgerald Act and its implementing regulations. The court of appeals thus erred in holding that California's law is not saved under Section 514(d) of ERISA.

1. The predominant purpose of the Fitzgerald Act was to institute a joint federal-state effort to encourage employers to provide adequate training to workers who seek to enter skilled trades, while at the same time protecting workers enrolled in apprenticeship programs from abusive employment practices. In 1930, seven years before Congress enacted the Fitzgerald Act, there was a shortage of skilled workers but a large number of young men and women employed in skilled trades who were not receiving organized training. H.R. Rep. No. 945, 75th Cong., 1st Sess. 1-3 (1937). Because the term "apprenticeship" was



used to describe any kind of beginning work experience, including "understudies and helpers and beginners and short-term operation learners," the apprentice experience was not a desirable choice. *To Safeguard the Welfare of Apprentices: Hearings on H.R. 6205 Before a Subcomm. of the House Comm. on Labor*, 75th Cong., 1st Sess. 72 (1937) [*House Hearings on H.R. 6205*] (statement of William F. Patterson, Executive Secretary of the Federal Committee on Apprentice Training). Individual employers did not want to spend money on adequate training for fear that the apprentice would work elsewhere after the training. *Id.* at 64 (statement of Julia O'Connor Parker, National Youth Administration). "Distrust and suspicion" often developed when either employers or workers undertook a training program alone. H.R. Rep. No. 945, *supra*, at 3; see also *House Hearings on H.R. 6205*, *supra*, at 43-44 (statement of John P. Frey, AFL).

In 1934, the Secretary of Labor created the Federal Committee on Apprentice Training, a group of government officials, employers, and employee representatives. H.R. Rep. No. 945, *supra*, at 2; see also 81 Cong. Rec. 2594 (1937) (statement of Rep. Mead). Its purpose was to encourage "genuine apprentice training under the National Recovery Administration codes and, at the same time, prevent the exploitation of apprentices and the break-down of labor standards." 81 Cong. Rec. 2600 (1937) (Memorandum on the Work of the Federal Committee on Apprentice Training); see also *id.* at 2594 (statement of Rep. Mead); H.R. Rep. No. 945, *supra*, at 2. The Committee could not "compel adherence to its recommendations," but, with cooperating state committees, it assisted employers and employees in setting up apprenticeship systems. S. Rep. No. 1078, 75th Cong., 1st Sess. 3 (1937). The Committee also established minimum standards for apprenticeship relating to "the scale of wages, ratio of apprentices to journeymen, the number of hours to be worked, the various processes of

the trade to be learned, the amount of supplementary school instruction, a written agreement between employer and apprentice, etc." *Ibid.*; see also *House Hearings on H.R. 6205, supra,* at 72-74 (statement of William F. Patterson).

In 1936, President Roosevelt requested a transfer of the Committee's functions to the Department of Labor, which in turn asked Congress to appropriate money for those functions. H.R. Rep. No. 945, *supra,* at 2. Some Members of Congress were reluctant to do so, however, until a law was passed authorizing the Secretary of Labor to perform the functions. *Ibid.* Representative Fitzgerald then introduced a bill that, after the House hearings and reports discussed above, was enacted as the National Apprenticeship Act, popularly known as the Fitzgerald Act. See ch. 663, 50 Stat. 664 (1937); 81 Cong. Rec. 2600, 6631-6641, 8505-8506 (1937).

2. Since 1937, the Department of Labor has recognized that the goals of the Fitzgerald Act can best be carried out by the States. H.R. Rep. No. 945, *supra,* at 5 (Joint Memorandum to the Chairman and Members of the Subcommittee on Appropriations for the Department of Labor, House of Representatives, from Frances Perkins, Secretary of Labor, and J.C. Wright, Assistant Commissioner, United States Office of Education). The States, in turn, have looked to the federal government "for leadership and research and for the determination of national standards." *Ibid.* Under this arrangement, state departments of labor were requested to establish apprenticeship councils. Using standards recommended by the Federal Committee on Apprenticeship as a guide, the state councils then set their own standards and procedures, which industry was asked to follow. After a state council was appointed and prepared its standards and procedures, it became part of the national apprenticeship system by securing recognition from the Department of Labor. See, *e.g.*, Bureau of Apprenticeship, U.S. Dep't



of Labor, *The National Apprenticeship Program* 3-4 (1953); *id.* at 2 (1945).

The Department of Labor has long recognized certain basic standards for apprenticeship, including a minimum number of hours of on-the-job work experience, supplemental classroom instruction, and a progressively increasing scale of wages. Those standards must be set out, with other terms and conditions of employment and training, in a written agreement that is registered with a state apprenticeship council or the Department of Labor. See *The National Apprenticeship Program, supra,* at 1-2 (1945); *id.* at 2-3 (1953); 16 Fed. Reg. 4430 (1951) (standards for certain federal contracts); *id.* at 8884 (1951) (standards for subminimum, apprenticeship wage under Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*). When the Secretary of Labor issued a comprehensive set of regulations in 1977 governing tne registration and approval of apprenticeship programs, see 29 C.F.R. Part 29; 42 Fed. Reg. 10,138 (1977), they formalized, but did not alter the essentials of, the joint federal-state cooperative effort to promote apprenticeship training and standards.

3. In passing the Fitzgerald Act, Congress acted "to strengthen the remedial measure which had been inaugurated by the Federal Committee on Apprentice Training." H.R. Rep. No. 945, *supra,* at 3. Three provisions of the Act are of particular importance here. The Act specifically "authorize[s] and direct[s]" the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices." The Act also directs the Secretary "to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship." Finally, it directs the Secretary "to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship." 29 U.S.C. 50.

As the Fitzgerald Act program has evolved since the 1930s, the Secretary has carried out his mandate to "promote" the federal standards and to "extend" their application by "cooperat[ing]" with the States in their efforts to apply regulations consistent with the federally formulated standards on state public works projects. That effort has largely met with success, see Pet. 8 n.2 (citing 28 States that have rules similar to those of California), and it has provided a strong impetus for the use throughout the economy of sound programs of apprenticeship training that comply with federal standards. See Bureau of Apprenticeship and Training, U.S. Dep't of Labor, *Executive Summaries, Apprenticeship 2000, Short Term Research Projects (Apprenticeship 2000)* 45 (1989) (States with SAC programs have approximately twice as many programs as States that rely on BAT for approval).

Under the Ninth Circuit's decision, the cooperative federal-state effort to promote and extend the federal apprenticeship standards is severely curtailed. As the Ninth Circuit itself observed in a later case, the decision below "end[s] any enforcement" of California's rule that state contractors may pay lower wages only to apprentices in programs that comply with the state—and therefore the federal, see p. 6 n.2, *supra*—apprenticeship requirements. *ABC Nat'l Line Erection Apprenticeship Training Trust* v. *Aubry*, 68 F.3d 343, 346 (9th Cir. 1995). Whether that result requires California to allow contractors to pay lower apprentice rates to all workers the contractor labels "apprentices," or whether instead it permits the State simply to require that all workers receive journeyman rates, is of no consequence. In either event, the State—and, by extension, the federal government—will have lost a valuable tool for "promot[ing] the furtherance of labor standards necessary to safeguard the welfare of apprentices" and for "encouraging the inclusion [of the federal standards] in contracts of apprenticeship." That result would "impair" the Fitzgerald Act and its implementing regulations.



Preemption of state laws like California's would have other effects on the federal Fitzgerald Act program as well. The Secretary has long believed that the States are best able to register and deregister apprenticeship programs, under federal standards and oversight. Based on that understanding, the Secretary authorizes States that have approved Fitzgerald Act programs to register and deregister programs for federal purposes. By eliminating the ability of the States to apply the federal Fitzgerald Act standards to contractors on the States' own public works programs, the Ninth Circuit's decision, if affirmed by this Court, would eliminate the incentive for States having approved apprenticeship councils to cooperate with the federal government in approving programs for federal purposes. See *Apprenticeship 2000 supra*, at 15-16; see also *Minnesota Chapter of Associated Builders and Contractors, Inc.* v. *Minnesota Dep't of Labor and Industry*, 47 F.3d 975, 980-981 (8th Cir. 1995). That result, too, would impair the effective administration of the Fitzgerald Act and its implementing regulations.[9]

4. The Ninth Circuit erred in holding (Pet. App. 18) the ERISA savings clause inapplicable because the state law at issue in this case may not be an "enforcement mechanism" under the Fitzgerald Act. Section 514(d) "does not state that preemption is inapplicable only when it would prevent enforcement of a federal statute. Instead, [it] applies whenever preemption would alter or amend or modify any federal law." *In re Schlein*, 8 F.3d

[9] Petitioners have not asked this Court to decide whether Section 514(d) of ERISA precludes preemption of state requirements that go beyond the Fitzgerald Act and its regulations. Cf. *Southern Cal.*, 841 P.2d at 1030 (invalidating state approval requirements that go beyond the Secretary's requirements). We therefore address only the state standards that conform to and implement the Secretary's standards.

745, 753 (11th Cir. 1993) (Section 514(d) saves provision in Bankruptcy Code giving debtors a choice of federal or state exemptions). Section 514(d) will not save "a state law [just because it] is consistent with or supplements a federal law. Rather, preemption of the state law must have a negative effect on the functioning of, or standards set forth in, the federal law." *Southern Cal.*, 841 P.2d at 1026; see also *id.* at 1027-1028 (Section 514(d) saves State's authority to approve programs for federal purposes); *Joint Apprenticeship & Training Council of Local 363* v. *New York State Dep't of Labor*, 984 F.2d 589, 593 (2d Cir. 1993) (ERISA preemption of State's deregistration of apprenticeship program would frustrate administration of Fitzgerald Act); *J.F.B. Painting & Supply Inc.* v. *Hudacs*, 620 N.Y.S.2d 612, 614 (App. Div. 1994) (requiring payment of prevailing wages when program has not been registered directly furthers the goals of the Fitzgerald Act, while preemption would frustrate those goals). For the reasons set forth above, preemption of the state law in this case would have such a negative effect on the Fitzgerald Act and its implementing regulations, and the law is therefore saved from preemption by ERISA's savings clause.

5. Preserving a State's authority to apply apprenticeship standards within the compass of the Fitzgerald Act is also a sensible way to reconcile ERISA and the Fitzgerald Act. See *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-376 (1990) (construing Section 514(d) to reconcile ERISA and provisions of the Labor Management Reporting and Disclosure Act, 29 U.S.C. 501). ERISA, which does not provide any substantive standards for apprenticeship plans, is generally designed to protect the interests of plan participants and beneficiaries. 29 U.S.C. 1001(a). An interpretation of the Fitzgerald Act that protects basic standards governing apprentices, including those who participate in apprenticeship programs that are subject to ERISA, would be consistent with that purpose. Moreover, applying the state—and thereby, the federal—apprenticeship standards would not defeat the purposes of ERISA preemption: ensuring that plans are subject to a uniform body of benefits law and relieved of administrative and financial burdens of complying with conflicting governmental directives. *Travelers*, 115 S. Ct. at 1677.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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